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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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August 17, 1993

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OUR FILE NO.

0573.025  
081793.mv

**BY HAND**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

RE: Southern Starr Limited Partnership  
Petition for Partial Reconsideration  
MM Docket No: 92-159

Dear Mr. Caton:

On behalf of Southern Starr Limited Partnership I transmit herewith an original and fourteen (14) copies of a Petition for Partial Reconsideration for filing with the Commission in the above-captioned proceeding.

Should the Commission have any questions regarding this matter, kindly direct them to the attention of the undersigned, counsel to Southern Starr Limited Partnership.

Yours truly,

  
Bradford D. Carey

BDC/mv  
Enclosures

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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

**Amendment of Sections 1.420 &  
 73.203(b) of the Commission's Rules**

Permitting FM Channel and Class  
 Modifications by Application

MM Docket No:

92-159

To: the Commission

**PETITION FOR PARTIAL RECONSIDERATION**

Southern Starr limited Partnership, the Licensee of FM Broadcast station WGNE, Titusville, Florida ("Starr"), by Counsel, files this Petition for Partial Reconsideration of the Report and Order in this proceeding, 58 Fed. Reg. 38535 (July 19, 1993) (the "R&O"). By this Petition, Starr urges that the Commission reconsider its refusal in the R&O to permit licensees of existing FM Broadcast Stations to use the one-step procedure for an upgrade based on "contour protection" without demonstrating that a "suitable" "reference site" complying with all spacing requirements exists.

**I. BACKGROUND**

The Commission has long held that upgrades of existing FM Broadcast stations are in the public interest. 50 Fed. Reg. 45439 (October 31, 1985). And, as illustrated by the Commission's actions in Mass Media Dockets numbered 80-90, 85-313 and 86-144, the Commission's policy is to encourage its broadcast licensees to upgrade to provide enhanced service to their audiences. Indeed, the stated purpose of this proceeding is to facilitate upgrades by existing licensees.

Under previous practice, the licensee of an existing station had to have an engineering study conducted to determine whether there was spectrum available for its station to be upgraded<sup>1</sup>. If the study showed that there was an area in which a transmitter could be constructed in compliance with all of the Commission's technical rules regarding spacing and citygrade coverage, the Commission would normally respond to a properly prepared and filed Petition for Rulemaking by issuing a *Notice of Proposed Rulemaking* seeking public comment.<sup>2</sup> Availability of a suitable site was presumed. After deliberating over any counter-proposals or adverse comments, if the proponent had filed supporting comments, the proposed upgrade would be granted if found by the Commission to be in the public interest. Then, a site-specific engineering proposal, demonstrating compliance with the spacing and citygrade coverage rules, could be filed with the Commission as an Application for a Construction Permit. The Licensee could specify the "reference site" or, alternatively, another site, including one that is "short-spaced", by demonstrating that other stations and allotments would be protected from prohibited interference by "contour protection".

Much of the application engineering study is duplicative of that performed for the upgrade petition. But there has

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<sup>1</sup>This proceeding and this *Petition* pertain only to upgrades on mutually exclusive channels.

<sup>2</sup>At the least, it takes the Commission several months to issue the *Notice of Proposed Rulemaking*. Delays often have been much greater.

always been a chance that spectrum allocation matters, other than counter-proposals in the relevant proceeding, would impact adversely on actual site selection once the upgrade Petition was granted.

**II. THE R & O SIMPLIFIED THE PROCEDURE FOR SOME LICENSEES**

**A. Fully Spaced Upgrades Are Now Available By Application.**

The R&O amended the Commission's Rules to permit those licensees who could propose a fully-spaced upgrade at a "reference site," from which city grade coverage will be obtained, to seek an upgrade merely by application. Thus, a licensee need only have prepared one engineering study and the legal portion of F.C.C. Form 301. The Licensees exposure to competing expressions of interest for the spectrum is considerably lessened and the legal and engineering costs are substantially reduced. Moreover, the public will benefit from increased service quicker under the one-step approach than the traditional method.

**B. Upgrades Based On Contour Protection Are Available In a One-Step Procedure If Full Spacing At A Viable Site Is Demonstrated.**

In the R&O, the Commission determined to permit one-step upgrades at other than fully spaced sites, based on contour protection *if* the application also demonstrated that there is a fully spaced, suitable, site, from which the city-grade

coverage rules would be met.<sup>3</sup> Thus, even though the licensee makes clear in its Petition that it has no interest in building at the reference site, and even though the Commission's Rules permit the licensee to build the station elsewhere based on contour protection, the R&O permits one-step upgrade as long as there is a theoretical reference site that the Commission's staff finds acceptable.

**C. Absent An Acceptable Reference Site, Contour Protection One-Step Upgrades Are To Be Denied**

If the Licensee can not find a fully spaced reference site and demonstrate its suitability, something not previously required at the allotment stage or ordinarily ever considered by the Commission, the Licensee may not use the one-step procedure. Rather, it must use the old, two-step procedure.

**III. THERE IS NO RATIONAL REASON NOT TO PERMIT ONE-STEP UPGRADES BASED ON CONTOUR PROTECTION WITHOUT DEMONSTRATION OF SUITABILITY.**

There is no reason not to permit stations to use the one-step upgrade based on demonstration of contour protection alone. The Commission's stated concern with the preservation of "core" allotment policies can be easily satisfied with a requirement that Licensee's utilizing one-step upgrades based on contour protection demonstrate that there is some place

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<sup>3</sup>Starr filed Comments in the proceeding demonstrating that it is a party in interest. This Petition is being filed within the time permitted under the Commission's Rules.

that would satisfy all pertinent minimum distance spacing requirements. The availability, suitability and state<sup>4</sup> of the "reference site should not matter. Once an allotment is granted in traditional proceedings, the state of the reference site<sup>5</sup> makes no difference. There is no basis for differentiation in the case of one-step upgrades.

In its timely filed *Comments* in this proceeding, Starr urged the Commission to permit one-step upgrades by all stations, regardless of the state or status of the land at the "reference coordinates". If a Licensee can demonstrate in an application that there is a site, irrespective of availability, suitability or state, from which the spacing rules are met, there is no reason for the Commission not to grant a one-step upgrade to a contour protected site.

**IV. THE R & O WILL RESULT IN ARBITRARY AND CAPRICIOUS RESULTS.**

The R&O requires that the availability and suitability of reference sites in contour protection cases be established to the satisfaction of the Commission. The Commission suggests that an inappropriate site would be one such as a National Forest in which the Forest Service has already prohibited the construction of towers.

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<sup>4</sup>e.g. land, water, forestation or high density habitation

<sup>5</sup>see previous footnote

The Commission has long held that, even in contested application proceedings, it will not consider local zoning matters absent proof that zoning permission will not be granted. The Commission has rejected statements from the heads of planning and zoning departments that the proposed use would be inconsistent with local zoning and that, in their very expert opinions, waivers would not be granted. The Commission has held that as long as there is the possibility of approval, even if under a waiver that virtually never is granted, no site issue should be added considered. Now, however, it appears that based on what-ever factors it may chose to consider from case to case, the Commission staff will determine whether a proposed "reference site" for a contour protection upgrade is suitable. This will necessarily require the staff to make judgements, always previously reserved to local or other authorities, regarding land use and availability. There can be no result but arbitrary decisions.<sup>6</sup> The Commission's unwillingness to extend to all Licensees (who can demonstrate the existence of some point on the earth, regardless of the use or shape of the land, at which all spacing rules are met) the ability to utilize one-step procedures is capricious.

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<sup>6</sup>Is the Commission really ready to make judgements on the use or availability of National Parks? Is the Commission prepared to entertain factual hearings on such matters and make Findings of Fact and Conclusions of Law on the suitability of reference sites at which no construction is actually contemplated?

**V. ALL UPGRADES SHOULD BE BY THE ONE-STEP PROCEDURE**

There is no reason for the Commission to maintain two systems for the upgrade of existing stations. As long as some theoretical "reference site" exists from which the upgrade is fully spaced, there is no reason to deny the public the additional listening choice represented by an upgraded station. The Commission has authorized the use of contour protection by stations wishing to move or upgrade. And, the Commission has authorized existing stations to skip the rulemaking process when upgrading at fully spaced sites and "contour protection" sites, provided that the applicant demonstrates that a fully spaced site exists and is suitable. There is no need, indeed no precedent for, a site suitability study of the reference site. All upgrades should be through the one step process: demonstrate some coordinates, wherever, from which full spacing to other stations is presented and select a site from which citygrade coverage of the principal community will be provided with the facilities proposed based on contour protection.

**VI. RESOURCES OF THE COMMISSION AND LICENSEES WILL BE WASTED.**

Both the Commission and its Licensees will waste their resources preparing, presenting and analyzing data indicative of whether a theoretical reference site would be "suitable" for construction of an upgraded station, when everyone understands that the station is not proposed to be



constructed, and would not be constructed, at the reference location. There is nothing for the Commission or the public to gain from such a wasteful exercise.

**VII. JUDICIAL RESOURCES WILL BE WASTED BY THE PRESENT RULE AND THE PUBLIC INTEREST WILL BE SUBORDINATED TO COMMISSION WHIMSY.**

When the Commission declines a one-step upgrade based on its staff's estimate that the reference site might not be suitable, the Licensee will either have to accept the Commission's decision or appeal it. If the Licensee accepts the Commission's determination, the public is the loser. The public in the upgrade area will have been deprived the reception of another station. If the Licensee appeals, ultimately the Court of Appeals will have to decide, in individual cases, whether the Commission's staff had reasoned and reasonable basis to conclude that a theoretical only reference site is not suitable. If there were a logical need for such litigation, that would be one thing. But there is no need for such appeal, because there is no need for the underlying rule.

**VIII. CONCLUSION: ANY REFERENCE POINT THAT IS FULLY SPACED SHOULD BE SUFFICIENT TO SUPPORT A ONE STEP UPGRADE.**

There is no justification for Commission to deny an upgrade for any existing station based on some future Commission assessment as to whether a theoretical reference site, at which the station would never be built, is suitable

or available. If a Licensee demonstrates that there is some point, be it on easily accessible farmland, the highest mountain top, the lowest valley, a river basin, or the sea, and regardless of the present use, if any, of the site, it should be able to upgrade its station through the one-step process.

The Commission is charged with ruling in the public interest. If asked whether they would prefer another radio reception service or the Commission to steadfastly maintain its policy that a suitable theoretical reference site must exist for one-step upgrades by Licensees even though there would be no prohibited interference due to contour protection, we believe that members of the public would opt for more service. The Commission should too.

Reconsideration of the R&O, by permitting one-step upgrades without demonstration of suitable reference sites is in the public interest. Southern Starr Limited Partnership respectfully urges that this Petition for Partial Reconsideration **BE GRANTED**.

Respectfully Submitted,

SOUTHERN STARR LIMITED PARTNERSHIP

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